No. 86-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA, LOCAL UNION NO. 1525, *Petitioners*,

v.

A.T. MASSEY COAL COMPANY, INC.; RAWL SALES AND PROCESSING COMPANY BLACKBERRY CREEK COAL COMPANY; SPROUSE CREEK PROCESSING COMPANY; TALL TIMBER COAL COMPANY; PIKCO MINING COMPANY; ROCKY HOLLOW COAL COMPANY; BLUE SPRINGS COAL COMPANY; ALLBURN COAL COMPANY, INC.; POND CREEK MINING COMPANY; P.M. CHARLES COAL COMPANY; WYOMAC COAL COMPANY, INC.; WINSTON COAL COMPANY; ROBINSON-PHILLIPS COAL COMPANY; M. & B. COAL COMPANY; SIMRON FUEL INC.; SHANNON-POCAHONTAS COAL COMPANY; ROYALTY SMOKELESS COAL COMPANY/TRACE FORK COAL COMPANY; BIG BEAR MINING COMPANY; PIKE COUNTY COAL CORPORATION; JOBONER COAL COMPANY; THC COAL COMPANY; BIG BOTTOM COAL COMPANY, INC.; OMAR MINING COMPANY; and DEHUE COAL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners United Mine Workers of America et al. reply herein to the Brief for A.T. Massey Coal Company, Inc. et al. ("Massey") in Opposition.

ARGUMENT

1. Despite Respondents' efforts to suggest otherwise, there is an undeniable conflict between the Fourth Circuit's decision and decisions of at least six other courts of appeals set forth in the Petition, 8-13. Other courts require a nonsignatory to arbitrate when objective factors reveal that nominally separate employers are in reality a single entity, regardless whether one part of the single entity has "authorized" the other to bind the first. The Fourth Circuit holds that the nonsignatory may be required to arbitrate only where it has "authorized" a signatory to bind it to do so. Had this "authorization" test been applied by the other courts of appeals, the outcomes of those cases would have been different. The various nonsignatory parties would quickly and simply have been held free of any collectively-bargained obligation. Petition, 10-11. Massey does not deny this. Nor does Massey deny that the Circuit conflict has produced contradictory results for the parties to this very dispute. Petition, 14, n. 14.

2. The fact that the Massey companies are separate bargaining units does not, as Massey contends, reconcile the conflict or render this dispute somehow unique. That the Massey companies are separate units would be significant only if the UMWA were not already the established representative of employees in each of the separate units. Were that the case, the signatory's arbitration duty could not be extended to nonsignatories because to do so would violate NLRA § 7 rights of employees who had not chosen the union as their representative. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 507 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Local One v. Stearns & Beale, Inc.*, 812 F.2d

763, ——, 124 LRRM 2809, 2815-2816 (2d Cir. 1987). The Second Circuit's recent *Local One* decision reflects that the "second prong" of the test—the unit determination—has never been held to serve any purpose other than protecting § 7 rights of unrepresented employees. Here, because Massey concedes the UMWA is the chosen representative in all units (Massey Brief, 2), no § 7 rights are involved. Contrary to Massey, the undisputed fact that no § 7 rights are implicated here does not "miss the point" (Massey Brief, 11, n. 8), but rather *is the point.*[1] The second prong, which is designed to protect the representational interests of employees, is automatically satisfied where as here the union has already been selected by employees in each of the units.

3. Implicitly conceding that no section 7 rights are at issue (Massey Brief, 11, n. 8), Massey claims that each employer unit "is entitled under the Act to negotiate and agree to its own, separate labor contract." This assertion falls of its own force because, in virtually the same

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[1] Massey's legal argument to the contrary rests on a patent lack of hesitance to quote out of context. Thus, Massey quotes *Pratt-Farnsworth's* recitation that even "if two firms are a single employer, a union contract signed by one would not bind both unless the employees of both constituted a single bargaining unit" 690 F.2d at 505 (Massey Brief 14); it *conveniently ignores* the subsequent declaration that a bargaining unit determination is *"totally unnecessary"*, 690 F.2d at 524 and n.17 (emphasis added), where no § 7 rights would be implicated in applying the agreement to the nonsignatory. Similarly Massey seizes on the statement in *Local One, supra,* that it is "against public policy to bind a nonsignatory company where the employees of both companies do not constitute a single collective bargaining unit." 812 F.2d at ——; 124 LRRM at 2816. Massey ignores that the nonsignatory in *Local One* employed *unrepresented employees* and that the "public policy" was carefully explained by the Second Circuit to be protection of "the Section 7 rights of the nonunion employees. . . ." 124 LRRM at 2815. Indeed, *Local One's* detailed review of "single employer" decisions reflects that protecting § 7 rights of unrepresented employees has been the sole objective of the unit determination in each and every case. *Id.* at 2815-2816.

breath, Massey concedes that "*contracts for separate units can be and often are bargained in a single negotiation.*" Massey Brief, 11. Whether that occurred here turns on the meaning of a particular contract provision which the single employer signed—a provision whose interpretation rests with the arbitrator. Application of NBCWA to other UMWA-represented units could hardly offend any *employer* right to bargain separately if that is the result which Article IA(f) (Petition, 3, n. 1; 4-5), as interpreted by the arbitrator, is found to contemplate.[2]

4. Massey inappropriately presses before the Court its contrary interpretation of NBCWA Article IA(f). Massey Brief, 8-9, n. 7. It claims that the provision applies only to new mining operations.[3] While the Union

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[2] An employer and a union representing separate units can lawfully agree to cover such separate units in a single collective bargaining agreement and even to merge the units. *General Motors Corp.*, 120 NLRB 1215 (1958); *Radio Corp. of America*, 135 NLRB 980 (1962); *Lever Brothers Co.*, 96 NLRB 448 (1951); C. Morris, *The Developing Labor Law*, 848-852 (2d Ed. 1983).

If the union *does represent* separate units, the union and employer may, by mutual consent, treat such units in a single agreement without even implicating, let alone offending, the "second prong" of the test. Only a decision by the union and employer to apply an agreement to a separate and distinct unit which the union *does not represent* could violate NLRA § 7. Where as here separate union-represented units are employed by a single employer, the question whether there has been a consensual decision by the union and employer to treat multiple units in a single agreement is purely a matter of contract interpretation for the arbitrator. *International Union v. E-Systems, Inc.*, 632 F.2d 487 (5th Cir. 1980) (dispute whether agreement covered separate union-represented unit was arbitrable); *International Bhd. of Teamsters v. Braswell Motor Freight*, 392 F.2d 1 (5th Cir. 1968).

[3] Massey refers to testimony given in the context of a dispute over the provision's application to newly-developed operations. The thrust of the testimony was that the provision would apply, consistent with NLRA § 7, only "if the UMWA is either recognized or certified as the collective bargaining agent of that corporation" and not otherwise. The testimony did not foreclose possible settings

disagrees vehemently with Massey's interpretation, the vital point here is that this is a dispute over the meaning of the contract which should properly be addressed to an arbitrator. Massey's contention has no proper place in an argument to a court over whether arbitration should be compelled. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) ("[w]hether the moving party is right or wrong is a question of contract interpretation for the arbitrator"). Similarly, Massey's protracted statement of factual background and its claim that UMWA's assertion of the grievance was belated (Massey Brief, 2-7) raise matters which should appropriately be presented to the arbitrator and ought not be allowed to deflect the Court's attention from the undeniable Circuit conflict set forth in the Petition.[4]

5. Massey rests on a patently-constricted concept of corporate veil-piercing. Its notion that veil-piercing serves only "to hold a corporate parent liable for debts its subsidiary cannot discharge" (Massey Brief, 15) overlooks that veil-piercing has been invoked by federal courts for a variety of purposes including *specifically the enforcement of arbitration duties as against nonsignatories in nonlabor settings. Fisser v. International Bank*, 282 F.2d 231, 234 (2d Cir. 1960). Petition 15, n. 15. The Fourth Circuit's "authorization" test would anomalously allow use of the corporate form to evade labor law obligations in the single context of collectively-

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other than development of new mining operations in which what is now Article IA(f) could also apply. In fact, the clause's clear terms (Petition, 3, n.1) envision application to existing as well as newly-developed operations where the Union already is, or becomes, the recognized or certified representative.

[4] Massey stresses that the NLRB General Counsel has taken the view that the UMWA violates § 8(b)(3) of NLRA, 29 U.S.C. § 158(b)(3), by merely pressing for arbitration. Massey Brief, 13. Massey tellingly neglects to mention that the NLRB General Counsel *expressly chose to defer to arbitration at the present stage of the proceedings*. At any rate, the views of agency counsel, as opposed to those of the agency, have no particular claim to judicial deference.

bargained arbitration duties. Not surprisingly, other circuits have held corporate veil-piercing to be applicable in enforcing labor arbitration duties.[5]

CONCLUSION

For the reasons stated in the petition and herein, the petition for writ of certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

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[5] Decisions of the Third and Sixth Circuits do envision that imposition of an arbitration duty on a nonsignatory to a labor agreement will result from veil-piercing where warranted. *Service Employees Union, Local 47 v. Commercial Property Services*, 755 F.2d 499, 504 (6th Cir. 1985); *American Bell, Inc. v. Federation of Tel. Workers*, 736 F.2d 879, 886, 889 (3rd Cir. 1984).

Contrary to Massey, decisions of the First and Ninth Circuits (see Massey Brief, 17) have held veil-piercing unwarranted in particular cases; they do not hold that nonsignatories could not be required to arbitrate where veil-piercing is deemed appropriate.